store, none of whom identified the Defendant as having tendered the checks to them, but merely that the proceeds of the checks were applied to the Defendant Petitioner's account. Thereafter, the Court permitted an F.B.I. agent handwriting expert to testify as to the handwriting on the subject checks, using as comparison checks that were never properly proven to bear the signature of the Defendant. The Trial Court permitted the exact type of cross-examination so roundly condemned by the Court of Appeal for the Fifth Circuit in the case of GINSBERG v. U. S., 257 F.2d., 950 and BLUMBERG v. U. S., 222 F.2d., 496. This related to cross-examination by the prosecutioner of the Defendant regarding items not in evidence and not admissable.

The most grievous error commited by the Trial Court was the over participation by the Court in the cross-examination of the Defendant, your Petitioner herein. The Trial Court posed some 278 questions during the Government's case in chief and propounded some 44 questions to the Defendant and his wife in the presentation of the Defendant's case. Thus, we see that the Trial Court permitted the Defendant to be tried inference upon inference, which is the exact set of circumstances considered by this Court in PEREIRA, et al., v. U. S., 74 S.Ct. 358, 347 U.S., p. 1:

> " . . . It is untenable because it is unreasonable to infer one or more facts from the inference of another fact . . ."

It is respectfully submitted that the decision in this case is in direct conflict with the Rule laid down in the HUBSCH v. U. S., 256 F.2d., 820, and the decision of U. S. v. GREEVER, D.C.D.C. 15 Fed. Supp., 755.

At this point it is interesting to note at page 5 of the decision of the Court of Appeals the Court's statement in the footnote where the Appellate Court called to the attention of the Trial Court the provisions of Rule 35 of the FEDERAL RULES OF CRIMINAL PROCEDURE, relating to reduction of sentence, clearly indicating that the Appellate Court had some question in its mind as to whether or not the Appellant had been afforded a fair and impartial Trial as guaranteed to him by the Constitution of the United States of America.

WHEREFORE, Petitioner respectfully prays this *Honorable Court* to issue its Writ of Certiorari directed to the Court of Appeals of the Fifth Circuit at New Orleans, Louisiana, commanding and requiring the said Court to transmit to this Honorable Court, upon a day certain to be named therein, a true and correct transcript of the Record which was before them in the aforesaid cause, together with a true and correct copy of the decision rendered therein and that upon a Hearing of this cause the aforesaid Judgment of the Honorable WILLIAM C. MATHES, Judge of the United States District Court for the Southern District of California, sitting by designation in the Southern District of Florida, be reversed and your Petitioner prays for all such further and other relief as your Honors may deem just and proper.

Respectfully submitted,

O. B. CLINE, JR.,
Counsel for Petitioner,
ELMER M. HARRIS,
1518-19 Alfred I. duPont Bldg.
Miami 32, Florida

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was this__ day of_____, A. D., 1961, mailed to the SOLICITOR GENERAL, Department of Justice, Washington 25, D. C.

_____

O. B. CLINE, JR.

Petitioner's Exhibit A.

JUDGMENT

On this 19th day of February, 1960, came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of wilfully causing to be transported in
18 United Sta erce forged checks in violation of Title
charged in cou s Code, Section 2314 and Section 2, as
the court hav s number one to thirteen, inclusive, and
anything to sa asked the defendant whether he has
and no suffici why judgment should not be pronounced,
appearing to t cause to the contrary being shown or
court,

IT IS AD
charged and c JDGED that the defendant is guilty as
victed.

IT IS AD
mitted to the DGED that the defendant is hereby com-
thorized repre tody of the Attorney General or his au-
itative for imprisonment for a period of

3 years o Count One of the Indictment,

3 years o Count Two of the Indictment,

3 years o Count Three of the Indictment,
said sente es to run concurrently.

IT IS ADJUDGED that imposition of sentence on Counts 4 thru 13, inclusive, is suspended and the defendant is placed on probation with the Probation Officer of this court for a period of five (5) years. Said probationary period to commence upon release from confinement of the sentence imposed on Counts 1 thru 3, inclusive. Periods of confinement to run concurrent with sentence of confinement heretofore or hereafter imposed by the courts of the State of Florida upon approval of the U. S. Director of Prisons acting for the Attorney General of the United States. The conditions of probation are that during the probationary period the defendant shall (1) obey all laws applicable to his conduct wherever he may be, and (2) shall comply with all rules which the Probation Officer shall prescribe for the guidance of his personal conduct.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Wm. C. Mathes
United States District Judge

The Court recommends commitment to:

_____

Clerk.

App. 3

Petitioner's Exhibit B.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18239

ELMER M. HARRIS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(December 27, 1960.)

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

RIVES, Circuit Judge: Each count of a thirteen-count indictment charged the defendant with wilfully causing to be transported in interstate commerce, from Miami, Florida, to Chicago, Illinois, a check in the amount of $200.00, signed "Arthur Markle," drawn on the South-

moor Trust and Savings Bank, Chicago, Illinois, knowing same to have been falsely made and forged, in violation of Title 18, United States Code, Sections 2 and 2314. The jury returned a verdict of guilty on each count. The court imposed three-year, concurrent sentences on the first three counts, and as to the remaining ten counts suspended sentence, and placed the defendant on probation for five years to commence upon his release from confinement.

The defendant had been a wealthy man, president of a corporation which had become bankrupt. He and his wife and their four adopted children lived in a large house in Miami, Florida. Before moving to Miami from Chicago, they had been close friends of Arthur Markle and that friendship extended over more than twenty years. In September 1958, Markle's son left school, and later became stranded in Miami. Upon invitation of the Harrises he took residence in their home. In November Markle came to Miami to see his son, and visited the Harris home every day until his return to Chicago on November 26. During his visit, he loaned the defendant $300.00 in cash and two $150.00 checks drawn on the Southmoor Trust and Savings Bank of Chicago. Within a month, that is on December 26, Markle was called from the Bank and told that his account was overdrawn. He went almost immediately to the Bank and there examined the series of $200.00 checks and found that they were not signed by him. Seven of the checks were payable to and endorsed by the defendant. From the banker's office, Markle telephoned to the defendant, who admitted having drawn the checks and promised to make

restitution. This he ultimately did, but not before the checks had been made good by the Bank and its insurer.

Markle testified that he had not authorized the drawing of the checks. A handwriting expert gave his opinion that there had been a conscious effort to imitate the authentic signature of Arthur Markle. Two of the checks had been deposited to the defendant's account at the Florida National Bank & Trust Company of Miami. That Bank had cashed five of the checks for the defendant in person. Several of the other checks had been openly delivered by the defendant to the respective payees. The defendant testified in his own behalf that, in addition to the loans totaling $600.00, Markle had told him that he usually had from $2,500 to $4,000.00 in the bank, and "he said that if I needed it, I could have it, or if I needed more money to call him up." The defendant further testified that he was unable to reach Markle by phone and simply drew the checks. On cross-examination the defendant was asked whether he had drawn other checks and signed Markle's name to them. He replied, "None that I can recollect." Over the objection of his counsel, the defendant was then questioned about Government Exhibits 23A through 23H, inclusive, which were photostatic copies of eight other checks in the aggregate amount of $1,500.00, each purporting to be signed by Arthur Markle and payable to and endorsed by the defendant. The defendant's replies were somewhat evasive, for example:

"These are not very clear copies, your Honor. The printing I can recognize as being mine. The

> signature looks like it's mine. But these are not very clear copies. However, if they were written, they certainly were paid if I owed them, because I have paid most everybody in the whole country that I owed anything."

The appellant insists that the court erred in denying the defendant's motion for judgment of acquittal made at the conclusion of the Government's evidence. There was then ample evidence to submit the case to the jury, including Markle's testimony that the checks were not signed or authorized by him and that the defendant had admitted over the telephone drawing the checks, the testimony of the handwriting expert as to comparisons with known specimens of the defendant's writing, and the testimony of the banker and of several others to whom the defendant had delivered the checks. Since the checks were put into circulation in Miami and drawn on a Chicago bank, there was sufficient evidence that the defendant *caused* them to be transported in interstate commerce. In any event, when the defendant introduced evidence in his own behalf, he abandoned his motion for judgment of acquittal made at the close of the Government's evidence.[1] The motion was renewed at the close of all the evidence and again denied.

It is true that the defendant made little or no effort to conceal his actions, and, if they believed his testimony, the jurors would have been warranted in finding that he acted in good faith upon the assumption of implied authority from Markle, an absence of fraudulent intent. On

[1] T'Kach v. United States, 5 Cir., 1957, 242 F.2d 937; Jackson v. United States, 5 Cir., 1958, 250 F.2d 897; Meeks v. United States, 5 Cir., 1958, 259 F.2d 328.

other hand, the jurors were warranted in not believing the defendant. They could reasonably have believed that the defendant thought simply that his long time friend would come to his rescue and protect him from his criminal misconduct. Fraudulent intent *vel non* and all other factual issues in the case were matters for the determination of the jury.[2]

The appellant raises other questions as to the allowance in evidence of other checks signed by the defendant for comparison purposes, permitting the defendant to be cross-examined as to Government's Exhibits 23A through 23H, and claimed excessive interrogation of the witnesses by the district judge. We have carefully considered each of these contentions but find them so obviously without merit as not to warrant discussion.

The judgment is

AFFIRMED.

[2] We refer to the provisions of Rule 35, Federal Rules of Criminal Procedure, solely to invite the exercise by the visiting judge of his untrammeled discretion

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